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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/759,788

01/16/2004

Thomas T. Yamashita

YAMA-009

8159

24353 7590 10/30/2009  
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EXAMINER

LEVY, NEIL S

ART UNIT

PAPER NUMBER

1615

MAIL DATE

DELIVERY MODE

10/30/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/759,788	<b>Applicant(s)</b> YAMASHITA, THOMAS T.	
	<b>Examiner</b> NEIL LEVY	<b>Art Unit</b> 1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 28 July 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,3-8,10,11,13,14,16,18-20,30,31 and 41-56 is/are pending in the application.
- 4a) Of the above claim(s) 30 and 31 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3-8, 10, 11, 13, 14, 16, 18-20, 41-56 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) 1,3-8,10,11,13,14,16 and 18-2030 are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 30,31 stand withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention and species , there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 1/23/06.

Claim 40 is to administration, thus a method requiring administration of the pesticide of Group III, non elected.

### ***Claim Rejections - 35 USC § 103***

ClaimS 1,3-8, 10, 11, 13, 14, 16, 18-20, 41-56 stand rejected under 35 U.S.C. 103(a) as being unpatentable over HARMON 3558787 and KLOPPING --3789122 in view of BEATY -5634959 as explained by evidence of BATH-6083293.

HARMON provides phytotoxic pesticides; fungicides, insecticides, nematocides in combination compositions (column 3 – 6) with nutrients and fertilizers. Pesticides are at 1-30% as dust, 10-50% aqueous (column 4). Included are sodium aluminofluoride (column 5, line 28), compositions are applied to plant (column 6, application).

Surfactants serve as the instant macronutrients and carbon skeleton energy source, ethoxylated alcohols, for example (column 7, lines 59-60, while macronutrients include free acids (column 7, lines 61, 62). Surfactants are at 2-3% (Example 1, 2.).

Micronutrients are seen as the sodium lignosulfonate sodium-complexing agent (Example 1) at 4%.No particular co-factor is readily evident .

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KLOPPING also provides pesticidal compositions for plant application(column 1) as copper and zinc complexes with benzamides (column 17, 18) functioning not only as fungicides, but also shows added efficacy against plant mites (col. 20, lines 5-10)..Also present are energy sources, oils (column 26, line 11+) as carbon skeleton energy components, with detergents, and (example 29) with water-soluble macronutrients-cane sugar.

BEATY is cited to show fertilizer and nutrients useful to apply to plants; Thus, the generally mentioned fertilizers of HARMON and KLOPPING would include these nutrient ingredients. BEATY includes as fertilizer component the seaweed extract (col. 4, charts). BATH gives us a breakdown of this seaweed,(Col. 6, table). The components of the seaweed include vitamins,biotin; macronutrients, N,P,Ca,Mg,,S,Cl, Na, C,H & O; micronutrients, Zn, Fe, Mn, Cu, B, Mo, & Co; and assimilable carbon-skeleton energyh components of protein & fat. The seaweed is about 10% of the fertilizer (col. 5, lines 12-18), Thus the vitamin would be at least at 10% of the lowest levels shown above trace, namely .000006 , or .0000006 %. The carbon-skeleton,fat @ 2.6 %, when 10% seaweed extract is present, would be 0.26 % of the composition, while the macronutrients would constitute , for N, @ 1.46 %, 0.146% of the composition, while the micronutrients if Fe @ 0.08956 % would be at 0.008956 %, all within the claimed instant ranges.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made desiring to utilize pest control means to protect crop plants, to use

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any of art recognized means, as of the HARMON &/OR KLOPPING, modified as desired to increase the range of pests protected against & the degree of protection, by using a combination of fungicides, with a miticidal added benefit of the KLOPPING fungicides with lower amounts of each fungicide required, & thus providing reduced toxicity to the plants themselves. One would also be motivated to add fertilizer, because both HARMON & KLOPPING so instruct, and BEATY shows what constitutes fertilizer for plant application, further specified as to the breakdown of components shown by BATH.

All references are applicable to the art of plant husbandry & enhanced production.

All the critical elements of the instant are disclosed. The amounts and proportions of each ingredient are result effective parameters chosen to obtain the desired effects. It would be obvious to vary the form of each ingredient to optimize the effect desired, depending upon the particular species and application method of interest, reduction of toxicity, cost minimization & enhanced plant growth effects.

Applicant has not provided any objective evidence of criticality, nonobvious or unexpected results that the administration of the particular ingredients' or concentrations provides any greater or different level of prior art expectation AS CLAIMED, and the use of ingredient for the functionality for which they are known to be used is not a basis for patentability.

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The instant invention provides well known old art recognized compounds, with well known art recognized effects, applied by well known art recognized methods to achieve improved control as is well known in the art.

The ingredients and amounts are known by the artisan to be used in amounts as are normally used in fertilizer and nutrient amendments. Absence of phytotoxicity would be a function of the concentrations of ingredients, and obvious to attain.

Claims 41-56 previously presented claims, changing comprising to consisting essentially. This is open language and subject to the same rejections ClaimS 1,3-8, 10, 11, 13, 14, 16, 18-20, 38 and 39 are rejected under 35 U.S.C. 103(a) as being unpatentable over HARMON 3558787 or KLOPPING --3789122 in view of BATH-6083293.

HARMON provides phytotoxic pesticides; fungicides, insecticides, nematocides in combination compositions (column 3 – 6) with nutrients and fertilizers. Pesticides are at 1-30% as dust, 10-50% aqueous (column 4). Included are sodium aluminofluoride (column 5, line 28), compositions are applied to plant (column 6, application).

Surfactants serve as the instant macronutrients and carbon skeleton energy source, ethoxylated alcohols, for example (column 7, lines 59-60, while macronutrients include free acids (column 7, lines 61, 62). Surfactants are at 2-3% (Example 1, 2.).

Micronutrients are seen as the sodium lignosulfonate sodium-complexing agent (Example 1) at 4%. No particular co-factor is readily evident .

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KLOPPING also provides pesticidal compositions for plant application(column 1) as copper and zinc complexes with benzamides (column 17, 18) functioning not only as fungicides, but also shows added efficacy against plant mites (col. 20, lines 5-10)..Also present are energy sources, oils (column 26, line 11+) as carbon skeleton energy components, with detergents, and (example 29) with water-soluble macronutrients-cane sugar.

BATH gives us the fertilizer & nutrients HARMON & KLOPPING instruct us to add for plant /crop application. The fertilizer includes the components of the instant composition other than the pesticide. These include molasses & yeast extract & a complexing component, from the combining of humus, yeast, molasses & seaweed,(summary). These components enhance crop growth & yield (col. 3, lines 47-63) & would provide through the enhanced plant health & resistance the instant reduction in phytotoxicity , as these are the very components of the instant composition.

The components of the seaweed ( Col. 6, table) include vitamins,biotin; macronutrients, N,P,Ca,Mg,,S,Cl, Na, C,H & O; micronutrients, Zn, Fe, Mn, Cu, B, Mo, & Co; and assimilable carbon-skeleton energy components of protein & fat.

The seaweed is about 10% of the fertilizer (col. 5, lines 12-18), Thus the vitamin would be at least at 10% of the lowest levels shown above trace, namely .000006 , or .0000006 %. The carbon-skeleton,fat @ 2.6 %, when 10% seaweed extract is present, would be 0.26 % of the composition, while the macronutrients would constitute , for N,

@ 1.46 %, 0.146% of the composition, while the micronutrients if Fe @ 0.08956 % would be at 0.008956 %, all within the claimed instant ranges.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made desiring to utilize pest control means to protect crop plants, to use any of art recognized means, as of HARMON &/OR KLOPPING, modified as desired to increase the range of pests protected against & the degree of protection, by using a combination of fungicides, with a miticidal added benefit of the KLOPPING fungicides with lower amounts of each fungicide required, & thus providing reduced toxicity to the plants themselves. One would also be motivated to add fertilizer, because both HARMON & KLOPPING so instruct, and BATH shows what constitutes fertilizer for plant application, further specified as to the breakdown of components.

All the critical elements of the instant are disclosed. The amounts and proportions of each ingredient are result effective parameters chosen to obtain the desired effects. It would be obvious to vary the form of each ingredient to optimize the effect desired, depending upon the particular species and application method of interest, reduction of toxicity, cost minimization & enhanced plant growth effects.

Applicant has not provided any objective evidence of criticality, nonobvious or unexpected results that the administration of the particular ingredients' or concentrations provides any greater or different level of prior art expectation AS CLAIMED, and the use of ingredient for the functionality for which they are known to be



used is not basis for patentability.

The instant invention provides well known old art recognized compounds, with well known art recognized effects, applied by well known art recognized methods to achieve improved control as is well known in the art.

The ingredients and amounts are known by the artisan to be used in amounts as are normally used in fertilizer and nutrient amendments. Absence of phytotoxicity would be a function of the concentrations of ingredients, and obvious to attain.

Claims 41-56 previously presented claims, changing comprising to consisting essentially. This is open language and subject to the same rejections

### ***Response to Arguments***

Applicant's arguments filed 7/28/09 have been fully considered but they are not persuasive. Applicant argues for unexpected results with objective evidence. However, the examples cited as evidence are of specific ingredients, but there is no claim to the combination of the applicant's Green Thumb fertilizer with specific pesticides known to be phytotoxic-inducing.

The results are not surprising. Applicant's definition of phytotoxicity-reducing is seen at the experimental section as a measure of overall vigor and appearance of sprayed plants. Any one in the horticultural or agronomic arts utilizing pesticides to provide crops also uses fertilizers to enhance overall vigor and appearance. For example, sucrose and surfactant alone were superior [0111-0119]. There is no surprise. No claims are allowed

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to NEIL LEVY whose telephone number is 571-272-0619. The examiner can normally be reached on Tuesday-Friday, 7 AM to 5:30 PM EST..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, ROBERT A. WAX can be reached on 571-272-0623. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/NEIL LEVY/

Primary Examiner, Art Unit 1615 10/27/09